Supreme Court, U.S.
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No. 03-253

In The Supreme Court of the United States

EARL OLD PERSON, CAROL JUNEAU, JOE McDONALD, and JEANINE PADILLA,

Petitioners,

v.

BOB BROWN, Secretary of State for the State of Montana; and JUDY MARTZ, Governor for the State of Montana,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

MIKE MCGRATH
Montana Attorney General
*SARAH A. BOND
Assistant Attorney General
Justice Building
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

**Counsel of Record*
for Respondents

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. In light of Petitioners' concession that the case is moot, whether this Court should exercise its discretion under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950) and *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994), to vacate the judgments of the courts below where: (1) Plaintiffs have thoroughly litigated this matter over seven years, including two bench trials with full appellate review in the court of appeals; (2) Plaintiffs waited some years into the ten-year legislative redistricting cycle before filing their Voting Rights Act challenge to the 1990 Montana legislative redistricting; (3) the case became moot after the court of appeals twice ruled on the merits of the Plaintiffs' claims, but before the petition for certiorari had been filed; (4) the court of appeals sua sponte ordered briefing on the issue of vacatur and declined to vacate the district court's judgment; and, (5) vacatur would disturb the orderly operation of the federal judicial system and impair the substantial public interest in sustaining precedent, avoiding waste of judicial resources, and promoting orderly development of the decisional law?

2. If the case is not moot, whether the Ninth Circuit Court of Appeals' unanimous decision correctly held that Plaintiffs failed to satisfy their burden of proof to show a violation of section 2 of the Voting Rights Act, 42 U.S.C. § 1973, either under the discriminatory intent or effect rules under *Thornburg v. Gingles*, 478 U.S. 30 (1986), where the record admittedly demonstrated that districts, one of the four challenged legislative districts had always elected an Indian-preferred candidate and two others had elected and re-elected Indian-preferred candidates under the challenged boundaries?

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CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., Art. III, § 2, cl. 1. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . "

42 U.S.C. § 1973

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) [language minority guarantees] of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, **based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) [language minorities] of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to**

> **have members of a protected class elected in numbers equal to their proportion in the population.**

(Emphasis added.)

28 U.S.C. § 2106.

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

In 1996, the Plaintiffs brought two section 2 Voting Rights Act claims, one alleging intentional discrimination, the second alleging dilutive effects arising from the boundaries of the 1990 Montana legislative redistricting in three separate and distinct regions in Montana. They sought as a remedy the creation of Indian majority districts in all regions. Each region is separated from the other by long distances. Plaintiffs withdrew their claims regarding the southeastern Montana area after discovering it was already districted into majority Indian House and Senate districts. (CR 84, 85.) The remaining two areas, the hi-line area in northeastern and northcentral Montana and Flathead/Blackfeet area in northcentral and northwestern Montana, went to trial in 1998.

All parties agree that the applicable test is the four-part test of *Thornburg v. Gingles*, 478 U.S. 30 (1986), i.e., the Plaintiffs have the burden of proof to show the three threshold "Gingles factors:" that the minority group is sufficiently numerous and geographically compact so that creation of a minority/majority district is possible; the minority group usually votes cohesively as a bloc for the same candidate, and the white majority usually votes cohesively as a bloc to prevent the election of the minority preferred candidate. If Plaintiffs meet their burden to show all these three factors, then the Court is to proceed to an exacting scrutiny of all the actual and practical local circumstances of electoral politics in the areas in issue and determine if, from a review of the totality of circumstances, the Plaintiffs have shown that the minority group does not have an equal opportunity to elect the candidates of their choice. *Johnson v. De Grandy*, 512 U.S. 997, 1016-17 (1994); *Voinovich v. Quilter*, 507 U.S. 146 (1993); *Whitcomb v. Chavis*, 403 U.S. 124, 149-60 (1971).

After a two-week trial in March of 1998, district court for the District of Montana, the Honorable Paul Hatfield presiding, issued a judgment, and extensive findings and conclusions, ruling on all counts for the Defendants. *Old Person v. Cooney*, CV 96-004-GF (D. Mont. 1998) (*Old Person, Hatfield* App. at 86a-174a). The district court did not dismiss the complaint, as Petitioners allege (Pet. for Cert. at 3). Plaintiffs offered heavily redacted versions of Commission hearings to show bias, but the entire transcripts revealed instead that the Commissioners believed racial districting to be inimical to a pluralistic democracy, rather than that they acted with intent to discriminate against Montana Indians. In fact, some Plaintiffs testified

that they did not believe Commission members intentionally discriminated against Indians (1998 Tr. 669:17-20), and that the Indian candidates sometimes lost elections for legitimate electoral reasons, *e.g.*, several Indians run against each other and split the vote (1998 Tr. 672:4-20) or because Indians did not come together to offer their best candidates (*e.g.*, 1998 Tr. 672:9-21). Commissioner Frisbee, who had lived on or near the Blackfeet Reservation all his life and had been inducted into the Tribe (1998 Tr. 1025-30), also believed that because of the well-documented historical enmity between the Flathead and the Blackfeet, they would not vote cohesively and were not within the same community of interest (Def. Ex. 515, 1998 Tr. of April, 1992 conference call). For that reason, as well as the significant geographical barrier presented by the Continental Divide in that area, the Commissioners had voted against the Flathead/Blackfeet District. (1998 Tr. at 1013:1-4; 1018:23 to 1019:23; 1071:11-21; 1072:23 to 1073:17; 1025:10 to 1030:7 and 1066:8-17; Def. Ex. 38 at 15; Ex. 515 at 2237.)

Only four Plaintiffs appealed and therefore four challenged legislative districts remained before the Court.[1] Old Person and Juneau, who lived on the Blackfeet Reservation and in Montana House District 85 and Senate District 43, appealed as to those districts; and MacDonald and Padilla, who both lived on the Flathead Reservation and in House District 73 and Senate District 37 appealed

[1] The Ninth Circuit stated that all eleven Plaintiffs appealed. (*Old Person I*, 230 F.3d at 1117, App. at 58a). This is simply an error. All Plaintiffs claimed to have appealed as to the Flathead/Blackfeet area only. Only four Plaintiffs live in that area, so only they had standing to appeal. (*See*, Applnts. Br. Mar. 8, 1999 at 2.)

as to their districts. The Plaintiffs who lived in the hi-line districts did not appeal. *Old Person*, *remand*, 182 F. Supp. 2d at 1003-5 (App. at 28a).

The Ninth Circuit affirmed the ruling that Plaintiffs had not shown intentional discrimination, ruling that evidence was presented on both sides of the issue, but that the district court had applied the correct legal test and its findings were not clearly erroneous. *Old Person v. Cooney* (*Old Person I*), 230 F.3d 1113, 1130 (9th Cir. 2000) (App. at 83a-84a). Judge Canby, writing for the Ninth Circuit, also ruled, however, that the district court calculation of white bloc voting had been incorrect, and that despite evidence of 25 to 30 percent white cross over voting in HD 73, white bloc voting had been established in the relevant areas under the *Gingles* test. The Court remanded the case for an application of the totality test, and a finding on the ultimate issue of vote dilution in the 1990 plan. *Old Person I*, 230 F.3d at 1130 (2000) (App. 84a, 85a).

In November 2001, the district court, the Honorable Judge Philip Pro presiding,[2] heard additional evidence of elections since the first trial, and also of the now ongoing regular decennial 2000 redistricting process. After a two-day trial on remand, Judge Pro ruled that the four remaining Plaintiffs only had standing to challenge the districts in which they resided, and therefore only four districts remained before the Court: *Old Person v. Brown*, (*Old Person*, *remand*), 182 F. Supp. 2d 1002, 1006 (D. Mont.

[2] Judge Hatfield died during the pendency of the appeal. Judge Molloy recused himself due to a conflict of interest, and Judge Pro, United States District Court judge for the district of Nevada, was appointed to preside over the remand proceedings.

2002) (App. at 32a); *Sinkfield v. Kelley*, 531 U.S. 28, 30-31 (2000); *Ruiz v. City of Santa Maria*, 160 F.3d 543 (9th Cir. 1998); *Shaw v. Hunt*, 517 U.S. 899, 904 (1996); *United States v. Hays*, 515 U.S. 737 (1995). The district court applied the mandate of the Ninth Circuit to evaluate the totality factors and ruled against the Plaintiffs, noting that three of the four challenged districts had already elected Indian-preferred candidates. *Old Person, remand*, 182 F. Supp. 2d at 1015-1016 (App. 48a.) Judge Pro did not dismiss Petitioners' Complaint as Petitioners allege (Pet. at 5), but, rather, issued a carefully crafted opinion and ruling in Defendants favor.

Plaintiffs appealed again to the Ninth Circuit. The Ninth Circuit again affirmed the district court. *Old Person v. Brown*, 312 F.3d 1036 (9th Cir. 2002) (*Old Person II*). (App. at 25a.) Plaintiffs sought rehearing and rehearing en banc. Sua sponte, the Ninth Circuit ordered briefing on several procedural issues, including whether the case was moot and whether vacatur was appropriate under the doctrine of *United States v. Munsingwear*, 340 U.S. 36 (1950). (Resp't App. at 1-2.) Only after the parties fully briefed these issues did the Ninth Circuit panel unanimously vote to deny the petition for rehearing and the Court voted to deny the petition for rehearing en banc. On April 23, 2003, the Court issued an order so indicating. (App. at 148a-149a.) On May 1, 2003, the panel unanimously issued its mandate. In July 2003, litigation in Montana state court essentially challenging the 2000 plan that created additional Indian majority districts in the areas in dispute herein ended. On July 2, 2003, the Montana Secretary of State accepted the 2000 plan and ordered the election administrators in Montana to implement its district boundaries. There are no more

elections to be held under the 1990 plan and, therefore, as of the date the 2000 plan was filed and became law, challenge to the 1990 plan is moot. Petitioners, in their extension of time within which to file a petition for certiorari and in the Petition itself admitted the same. (Applic. for Ext. at 3; Pet. at 8.)

Petitioners have failed to prevail in any court since the inception of this case in 1996. They now invoke the power of this Court under 28 U.S.C. § 2106, under the reasoning discussed but not applied, in *United States v. Munsingwear*, 340 U.S. 36 (1950). That doctrine and the statute cited allow this Court to exercise its discretionary authority to direct the lower court to vacate the judgment as to the appealed portions of the case where review has been prevented "by happenstance" because the case has become moot while on appeal. The equitable doctrine is invoked and applied to mitigate the unfairness to a party whose right to review was prevented through the accident of mootness by happenstance.

SUMMARY OF THE ARGUMENT

1. As Petitioners concede, this challenge is moot. Petitioners no longer had standing to bring it upon the adoption in July of the regular 2000 redistricting plan that replaced the challenged 1990 plan. The Petition must be dismissed for want of jurisdiction. The 1990 district boundaries no longer exist, and the 1990 Commission that adopted the challenged districts no longer exists (in Montana, a new commission is created every ten years to perform the redistricting and each Commission is dissolved upon the filing of the plan. Mont. Const. art. V, § 14; Mont. Code Ann. § 5-1-111(3)). (*See, Old Person I*, 230 F.3d

at 1118, App. at 60a-61a.) Nor do the 1990 districts have any continuing legal effect. Because redistricting in Montana is performed by an ephemeral body solely existing for that purpose, each plan becomes moot upon adoption of the next plan by the new commission.

During the lengthy litigation below, the new 2000 Commission was appointed, created, and adopted a new decennial districting (*See*, *Old Person*, *remand*, 182 F. Supp. 2d at 1014, 1015, App. at 46a-47a) and, therefore, none of the Petitioners now have any cognizable interest in the 1990 plan. Article III, section 2 of the United States Constitution limits the judicial power of the federal courts to live cases or controversies, and this Court has consistently and necessarily held that a controversy must present a live case or controversy at all stages of the proceeding to satisfy the constitutional minimum requirement of a case or controversy upon which to act. *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997); *United States v. Hays*, 515 U.S. 737, 742-43 (1995); *Ruiz v. City of Santa Maria*, 160 F.3d 543, 549 (9th Cir. 1998).

2. The only question in light of the mootness, is whether the lower court judgments should be vacated, as Petitioners claim. As in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), however, Petitioners here have shown no exceptional circumstances entitling them to an order that the lower court judgment be vacated. The public interest in finality of judgments weighs strongly against such vacatur, especially here where Petitioners have not only had their day, indeed years in court, but the public interest in precedential stability in this volatile area of law is quite high and Petitioners have advanced no specific reasons why vacatur is required to prevent injustice. It

would be fundamentally unfair to vacate the lower court judgment just because the Petitioners had the resources to continue litigating for the better part of a decade until the next redistricting occurred. Montana expended $19,543 in costs in the first two-week trial alone, and vacatur would presumably unfairly eliminate Plaintiffs' obligation for costs. (CR255.)

Petitioners incorrectly claim vacatur is routine procedure; in fact, this Court has substantially raised the bar for when it may be allowed. Montana asserts that this Court should do as it did in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950); *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994), and *Karcher v. May*, 484 U.S. 72 (1987): dismiss the petition and leave the lower court rulings, fully-litigated and finally-reviewed, intact. The equitable doctrine of vacatur requires a careful balancing of public and private interests because the public has a strong interest in sustaining precedent and developing decisional law. *U.S. Bancorp*, 513 U.S. at 26, 27. This Court has held that it applies the same strict analysis for vacating judgments under Fed. R. Civ. P. 60(b) to 28 U.S.C. § 2106 because vacatur, " . . . quite apart from any considerations of the fairness to the parties – disturb the orderly operation of the federal judicial system." *U.S. Bancorp*, 513 U.S. at 27.

> "Public interest in finality of judgment encompasses the development of decisional law, the importance of the opinion to nonparties, and the deterrence of frivolous litigation." See *Austin*, 181 F.R.D. at 286. It is particularly significant to preserve judgments where there has already been a substantial expenditure of judicial resources in the case. *Id.*

Carter v. Rosenberg & Estis, P.C., 1999 U.S. Dist. LEXIS 131 (S.D.N.Y. 1999).

Here, the case did not become moot until after the Ninth Circuit ruled for Montana the second time, so Plaintiffs' right of review can hardly be said to have been thwarted. As this Court noted in *U.S. Bancorp*, vacatur is reserved for only exceptional situations, as judicial precedents are presumed valid and the public interest not only demands an eventual end to litigation, but some stability in the law. The Ninth Circuit implicitly and correctly came to this same conclusion when, after ordering briefing sua sponte on this issue, it simply affirmed the panels unanimous opinion affirming Judge Pro's opinion on remand. (April 23, 2003 Order, App. at 148a-149a.)

3. If the Court determines that the case is not moot, it should deny the petition because the underlying decisions are correct. All of the opinions and judgments have applied the standard *Thornburg v. Gingles*, 478 U.S. 30 (1986) analysis and totality of circumstances tests, and all have concluded that Plaintiffs have not met their standard of proof. The essence of a voting rights act claim is that the boundaries themselves dilute the Plaintiffs' participation in the process. In *Voinovich v. Quilter*, 507 U.S. 146, 155 (1993) the Supreme Court stated:

> "Instead, § 2 focuses exclusively on the consequences of apportionment. Only if the apportionment scheme has the effect of denying a protected class the equal opportunity to elect its candidate of choice does it violate § 2; where such an effect has not been demonstrated, § 2 simply does not speak to the matter. See 42 U.S.C. § 1973(b)."

Both the trial court in 1998 and the court on remand made the requisite exacting scrutiny, and found the 1990 boundaries caused no vote dilution. None of the lower court judgments is contrary to the law of this Court or of other Courts of Appeal, and it is appropriate for this litigation, at long last, to end. (*Old Person, Hatfield*, App. at 86a-135a; *Old Person, remand*, 182 F. Supp. 2d at 1003-1020, App. at 27a-56a; *Old Person II*, 312 F.3d at 1037-1050, App. at 1a-23a.)

ARGUMENT

I. THE PETITIONERS' CHALLENGE TO MONTANA HOUSE DISTRICTS 85 AND 73 AND SENATE DISTRICTS 37 AND 43 OF THE 1990 MONTANA STATE LEGISLATIVE DISTRICTING DOES NOT PRESENT A JUSTICIABLE CASE OR CONTROVERSY, AND SO THE PETITION MUST BE DISMISSED.

A. Petitioners Had Standing to Challenge Only the Districts in Which They Resided, and Those Districts No Longer Exist.

It is axiomatic that, " 'The jurisdiction of federal courts depends on the existence of a 'case or controversy' under Article III of the Constitution' . . . 'A case, or an issue in a case, is considered moot if it has lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law' " (citations and internal quotation marks omitted). *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 797-98 (9th Cir. 1999). Petitioners admit that the adoption of the 2000 districting plan moots the case. (Pet. at 8). On April 23, 2003, after reviewing the parties' briefs on mootness

and satisfying itself that the case was still live, the Ninth Circuit denied rehearing and rehearing en banc. (App. at 148a-149a). On July 2, 2003, the Montana Secretary of State filed the superceding 2000 plan and ordered the election administrators to implement its boundaries for the next election. At that point this case became moot. Thus no justiciable controversy exists.

There can be no serious argument under *United States v. Hays*, 515 U.S. 737 (1995), that Plaintiffs have no standing to challenge districts in which they do not reside. See *Sinkfield v. Kelley*, 531 U.S. 28 (2000).

> "We are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us. The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of the [jurisdictional] doctrines.'" *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-231, 110 S. Ct. 596, 607-608, 107 L. Ed. 2d 603 (1990) (citations omitted). It is by now well settled that "the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

United States v. Hays, 515 U.S. at 742-43 (citations omitted). Federal courts may not " . . . adjudicate challenges to

state measures absent a showing of actual impact on the challenger, *see, e.g., Golden v. Zwickler*, 394 U.S. 103, 110 (1969)." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 48 (1997). Thus, this Court may not entertain the theoretical arguments Plaintiffs may wish to voice regarding who said what during a political hearing or the wisdom of creating Indian majority districts for the state legislative elections.

B. Petitioners Do Not Allege Injury From the Adoption of the New 2000 Districts, So There is No Longer a Justiciable Case or Controversy Before This Court.

The harm alleged here is that the 1990 district boundaries themselves dilute the Plaintiffs' votes. The injury alleged – dilutive districting – has been mooted by the adoption of the 2000 Commission plan and Petitioners have indicated they are not injured by that plan (Pet'r Applic. for Ext. of Time at 3; Pet. at 8). The precise issue was addressed in *Ruiz v. City of Santa Maria*, 160 F.3d 543 (9th Cir. 1998), "This lawsuit would be moot if, for example, Plaintiffs had moved out of Santa Maria or the City had already adopted a district election system" (citations omitted). *Ruiz*, 160 F.3d at 549.

Here the challenged districts can never again be the basis for an election because the well-documented and tremendous demographic changes that occurred in Montana between 1990 and 2000 make them severely malapportioned. (*Old Person, remand*, 182 F. Supp. 2d at 1018-19, App. at 52a-59a). No court could order the challenged boundaries reinstated. (*See* Appellees' Br., April 15, 2003, at 13); *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); *Abate v. Mundt*, 403 U.S. 182, 185 (1971);

Karcher v. Daggett, 462 U.S. 725, 744 (1983); *Chapman v. Meier*, 420 U.S. 1, 26 (1975). Therefore, even if there were to be an additional future challenge to the 2000 districting and a court were to order changes to be made to that plan, no return to the 1990 districts is possible.

II. PETITIONERS ARE NOT ENTITLED TO VACATUR BECAUSE NO EXCEPTIONAL CIRCUMSTANCES EXIST TO SUPPORT IT, BECAUSE THE PUBLIC INTEREST IN FINALITY OF JUDICIAL DECISIONS WEIGHS AGAINST IT, AND THEIR RIGHT TO REVIEW WAS NOT TRUNCATED BY THE INEVITABLE MOOTNESS CAUSED BY ADOPTION OF THE NEW DISTRICTS.

A. This Court's Power to Order the Vacatur of a Lower Court Judgment Because of Mootness is an Extraordinary One, to Be Sparingly Used Only Upon Petitioners' Showing That Equity Demands Such an Action.

The statutory authority for vacatur is 28 U.S.C. § 2106. It provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

The policy of directing a court to vacate a judgment when the matter becomes moot on appeal is not, as Petitioners allege, routine. In fact it was rejected by this Court

in both of the leading cases on the doctrine and should be rejected here. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950); *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994).

Further, "It is Petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate not merely equivalent responsibility for the mootness, but equitable entitlement to the extraordinary remedy of vacatur." *U.S. Bancorp*, 513 U.S. at 26. Petitioners have advanced no such argument. Here, mootness was simply the inevitable result of the Petitioners' commencement of action in 1996 and their continuing to litigate for the better part of a decade. Since Montana has always redistricted every ten years to account for population changes, mootness was inevitable.

In *U.S. Bancorp*, the Court addressed the equitable and extraordinary nature of vacatur.

> "As always, when federal courts contemplate equitable relief, our holding must also take account of the public interest. 'Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.'"

513 U.S. at 26, 27. (citations omitted.) The court then refused, as had the Court in *Munsingwear*, to vacate the lower court judgment and simply dismissed the case as moot. *Id.* at 29.

The Court also pointed out that the oft-quoted statement in *Munsingwear* that vacatur has become established practice was dictum, and not entirely accurate even

for the time. 513 U.S. at 23. Petitioners' other authority is not persuasive, either. For example, in *Karcher v. May*, 484 U.S. 72 (1987), this Court did not grant vacatur, despite the fact that the case was, as is this one, no longer justiciable.

B. The Balancing of Public and Private Interests in Preservation of Judicial Precedent Strongly Weighs Against Vacatur Herein Because the Case Did Not Become Moot Until After a Second Review by the Ninth Circuit, Because the Matter is so Fact Specific That There Can Be No Future Litigation of the Issues Presented Herein, and Because the Public Interest in Judicial Finality Weighs Heavily in Favor of Allowing the Lower Court Judgments to Stand.

This Court explained the two primary purposes for exercising the authority granted in 28 U.S.C. § 2106 in *Munsingwear*. We explained that vacatur "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." 340 U.S. at 40. Neither of these purposes would be served by granting vacatur herein. Additionally, *U.S. Bancorp* requires the balancing of public interest in judicial finality against any demonstrated injustice from the procedure. *U.S. Bancorp*, 513 U.S. at 26, 27.

First, the purpose of "clearing the path for future relitigation of the issues between the parties" has no place in a section 2 Voting Rights Act claim relative to specific districts that exist no more. The facts giving rise to these claims can never recur – the demographics as well as the

districts themselves are no more – so encouraging relitigation is for naught. A future political or racial Voting Rights Act claim against the 2000 districts is necessarily another case, not a relitigation of this one. *See, e.g., Ruiz v. City of Santa Maria*, 160 F.3d 543, 556 (9th Cir. 1994). Litigants hardly need encouragement to litigate these issues and, as has been expressed so often by this Court, the need for some stability and certainty in this area is all too acute already. *See* discussion in *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996). On the other hand, the detailed findings and conclusions that were issued in the case provide some guidelines to future redistricters in Montana, however nebulous the matters of cohesion, geographic compactness, and communities of interest might be.

Second, the case herein did not become moot until after the second full substantive review thereof, so Petitioners' rights of appellate review on the merits have not been truncated. Petitioners have no right to review by certiorari in this Court. On April 4, 2003, the Ninth Circuit properly sought to inform itself whether the matter remained a live controversy, and sua sponte order briefing on the mootness issue and other procedural issues prior to issuing its second affirmance of the district court judgment for Montana. (Resp. App. at 1-2.) Only after that briefing was considered did the second affirmance issue on April 23, 2003. The unrelated state litigation was resolved and the 2000 plan filed on or about July 2, 2003, well after the Ninth Circuit ruled. Not only was this issue considered and the question of vacation of lower court rulings rejected, but the Ninth Circuit clearly had jurisdiction at the time it last ruled, a fact that distinguishes this case from *Arizonans for Official English v. Arizona*, 520 U.S. 43

(1997). This sequence is corroborated in the Petition. (Pet. at 8.) Having prolonged this litigation by every possible avenue, Petitioners should not be empowered to wipe the slate clean of unfavorable rulings, including an obligation for taxation of Defendants' cost for the first trial of $19,593, validly issued through the simple expedient of motions for extensions of time and, because of the inevitable redistricting, vacatur. Once the case became moot, Plaintiffs were not entitled to review by certiorari, and this Court cannot grant it.

Third, the public interest in finality of the judgment is strong. "As always when federal courts contemplate equitable relief, our holding must also take account of the public interest. 'Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.' *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (*Stevens, J.*, dissenting)." *U.S. Bancorp*, 513 U.S. at 26, 27.

This litigation produced lengthy analyses about the electoral process in Montana and, while the specific injury claimed cannot recur, the analyses have precedential value as a record of the totality factors at that time. Commissioners whose names were cleared in 1998 of the claim that they acted with discriminatory intent are entitled to the finality of that judgment. There is no injustice to Petitioners to allow the lower court judgments to stand, and every injustice to the judicial system, the public, and the state in taking that victory away, especially where obtained, as here, through the expenditure of considerable judicial resources. The precedent is "a public act of a public official, . . . not the parties' private property."

Dubrowsky v. Estate of Perlbinder, 268 B.R. 6, 8, 2001 U.S. Dist. LEXIS 17067 (E.D.N.Y. 2001) (quoting from *Manufacturers Hanover Trust Co. v. Yanakas*, 11 F.3d 381 (2d Cir. 1993).

III. IF THIS COURT FINDS THAT THE CASE IS NOT MOOT, THE PETITION SHOULD BE DENIED BECAUSE THE LOWER COURT DECISION IS CORRECT BOTH WITH RESPECT TO THE DISCRIMINATORY PURPOSE CLAIM AND TO THE DISCRIMINATORY EFFECTS CLAIM.

If this Court were to find the matter reviewable, the petition should be denied. A complete review of the record reveals that the trial court rulings and the Ninth Circuit affirmances were fully supported by the record and comply with applicable law. Regarding the intentional discrimination claim, *Old Person I* noted that the Commission, in fact, significantly increased the number of Indian majority districts, did not deviate from its established criteria, and did not burden Indians more than whites. *Old Person I*, 230 F.3d at 1130-31 (9th Cir. 2000) (App. at 84a). "We agree with the district court that there was insufficient evidence of discriminatory purpose on the part of Commission members in adopting the plan, and affirm the court's ruling on that claim." *Old Person I*, 230 F.3d at 1117 (9th Cir. 2000). (App. at 58a.)

Regarding the Voting Rights Act results claim under section 2, the record also reflects that each court to hear the matter appropriately applied the *Gingles* tests to determine if, from an "exacting review" of the practical circumstances of electoral politics in the challenged districts, the minority is deprived of an equal opportunity to elect the candidates of their choice. (*Old Person I*, at

1120, App. at 64a-65a: *Old Person remand*, 182 F. Supp. 2d at 1006-1017, App. at 33a-48a.)

Any error in the appellate decisions was in Plaintiffs' favor. For example, writing for the panel in *Old Person I*, Judge Canby had recalculated the voting statistics to conclude that the white voters usually voted as a bloc to prevent the Indian-preferred candidates from winning. Thereafter, however, the Indian-preferred candidates in fact won – in three of the four challenged districts – twice. The Indian-preferred candidate had always won in one of the four challenged districts (HD 85), but the Ninth Circuit had ruled that these results could not be counted in the white bloc voting calculation throughout the challenged area. (*Old Person I* at 1127, App. at 77a.) That analysis left the white bloc voting calculations inevitably skewed to Plaintiffs. If *Old Person I* correctly concluded that cohesion and white bloc voting usually occurred, then it must be admitted that such calculation did not accurately predict future voter behavior in those districts. Nevertheless, *Old Person I* correctly remanded for a totality determination and the court on remand took a great deal of evidence regarding access to the electoral process. The ultimate result was a correct ruling in the ultimate issue and an affirmance of that decision.

Upon review of the entire record, the district court on remand noted the record demonstrated that only four districts were before it, and three had elected Indian-preferred candidates. One of those, HD 85, had always done so. Judge Pro followed the mandate of the Ninth Circuit to apply the totality test of *Thornburg v. Gingles*, ruling that the repeated successes of the Indian-preferred candidates in the challenged districts precluded a finding of vote dilution. *Old Person, remand*, 182 F. Supp. 2d at

1015, 1016. (App. at 48a.) He held that the essence of a vote dilution claim is proof of unequal access to the electoral process and, logically enough, that the Indians repeated electoral successes in the districts in issue refuted the notion that American Indians were denied equal access to the process. *Old Person remand*, at 1016, App. at 48a.

The Ninth Circuit in *Old Person II* correctly affirmed. Plaintiffs had offered no witnesses on remand with personal knowledge of the totality factors. *Old Person II*, 312 F.3d at 1043, App. at 11a. The 2000 Commission was by then fully engaged and working toward the inevitable new districts. The essence of the section 2 claim is that the boundaries themselves disadvantage the voters. *Voinovich v. Quilter*, 507 U.S. 146, 155 (1993). Here, the district court concluded: "The parties have not presented new evidence with respect to this factor, and hence there is a notable lack of evidence that American Indians would fare any better in terms of their access to the political process if this Court were to order immediate district boundary changes" (*Old Person, remand*, 182 F. Supp. 2d at 1013, App. at 44a). On the record presented in 2001, therefore, the district court inevitably concluded that vote dilution had not been shown.

The district court's weighing of the factors is subject only to the clear error rule because there is no bright line test. (*Old Person I*, 230 F.3d at 1119, App. 62a.) In *Johnson v. De Grandy*, 512 U.S. 997 (1994), this Court observed that "the degree of probative value assigned to proportionality may vary with other facts. No single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength." 512 U.S. at 1020-21.

The trial court judges were in the best position to view the evidence and determine the veracity of the witnesses. *Georgia v. Ashcroft*, ___ U.S. ___, 123 S. Ct. 2498 (2003). There is no clear error, and so no reason, certainly no compelling reason, to grant the petition herein. In any event, after seven years of litigation attempting to prove the dilutive effects of the 1990 districts, the 2000 districts were adopted in the regular course of decennial redistricting and the case is now moot.

CONCLUSION

The petition for certiorari should be dismissed in its entirety for lack of jurisdiction, or alternatively denied.

Respectfully submitted,

MIKE MCGRATH
Montana Attorney General
*SARAH A. BOND
Assistant Attorney General
Justice Building
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

**Counsel of Record*
for Respondents

October 17, 2003

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARL OLD PERSON, et al., Plaintiffs-Appellants, v. BOB BROWN, Secretary of State for the State of Montana, et al., Defendants-Appellees.	No. 02-35171 D.C. No. CV-96-00004-PMP District of Montana, Great Falls ORDER (Filed Apr. 4, 2003)

BEFORE: THOMAS, Circuit Judge and En Banc Coordinator

The parties shall file briefs on or before April 11, 2003, addressing the question of whether this case is now moot because of any actions conducted pursuant to Article V, § 14(4), *Constitution of Montana*, subsequent to the order of the district court in this case, including the submission of a new redistricting plan by the Montana Districting and Apportionment Commission. The parties shall advise the Court on the status of the new redistricting plan, including a discussion of the pending state litigation pertaining to the plan filed by the Montana Secretary of State, and any legal significance thereof as it applies to this case.

The parties are encouraged to discuss the impact, if any, of the following cases and their progeny: *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), *United States v. Sibron*, 392 U.S. 40 (1968) and *Moore v. Ogilvie*, 394 U.S. 814 (1969). The parties shall also address the significance of any pertinent Montana constitutional and statutory law.

The briefs shall conform to Fed. R. App. P. 32 in form, except that the cover sheet may be on white paper. The briefs shall not exceed fourteen (14) pages or 7,000 words. The briefs should be faxed to the Clerk of Court in San Francisco, CA, by 4:00 P.S.T. on April 11, 2003. The facsimile number is (415) 556-9721. The parties shall also post to the Court on that date, by express mail, or other similar service, an original and fifty (50) copies of the brief.

The parties are also directed, pursuant to Fed. R. App. P. 10(e) to submit a copy of the complaint filed by the Montana Secretary of State pertaining to the new redistricting plan and a copy of the state court docket sheet pertaining to the action.